

STATE OF MICHIGAN

SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
AND THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

GERLING KONZERN ALLGEMEINE
VERSICHERUNGS AG, Subrogee of
REGENTS OF THE UNIVERSITY OF
MICHIGAN,

Plaintiff-Appellant,

vs.

Supreme Court No: 122938

Court of Appeals No: 237284

Lower Court No: 99-11061 CZ
Hon. Timothy P. Connors

CECIL R. LAWSON and AMERICAN BEAUTY
TURF NURSERIES, INC., Jointly & Severally

Defendant-Appellee.

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DEFENDANTS-APPELLEES'

REPLY TO BRIEF ON APPEAL

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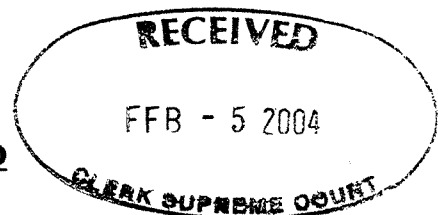


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COUNTER STATEMENT OF ISSUES INVOLVED

- I. Did the Passage of the 1995 Tort Reform Legislation in Which Joint and Several Liability Has Been Abolished, Replacing it with Several Liability, Only: MCL 600.2956; MCL 600.2957; MCL 600.6304(1) and by the Amendment of the Contribution Statute to Be in Harmony with the Tort-Reform Legislation, Serve to Abolish Contribution Between Alleged Tort-Feasors, That Are Not Subject to Certain Exceptions, Because a Settling Party Was Never Exposed, Obligated, Compelled or Liable for Any Sum in Excess of its Pro Rata Share of Liability and, any Payment Made by or on Behalf of the Settling Tort-feasor Would Be Based upon an Assessment of That Parties Own Percentage of Fault? Therefore, a Tort-Feasor That Enters into a Settlement May Not Claim That it Paid More than its Pro Rata Share of Common Liability Which Is a Requisite under the Contribution Statute.

Defendant-Appellee answers: Yes.

Court of Appeals answers: Yes.

SUMMARY OF DEFENDANT-APPELLEES ARGUMENT

The Court of Appeals properly analyzed the: tort reform legislation, the fundamental basis for contribution and the intent of the legislature for “fair share liability” in concluding that under the facts of this case, Plaintiff-Appellant cannot sustain a claim for contribution, because it has been abolished as a matter of law. The fundamental basis to be able to assert a claim for contribution is that the party who seeks contribution was at a risk of owing and allegedly paid a greater pro-rata share of its liability. The fundamental fallacy with Plaintiff-Appellant’s argument is that it fails to recognize that upon which contribution is premised. This premise has been in place for decades having been embodied within the Contribution Statute and interpreted by the Supreme Court. That is: a party had exposure to pay a greater share of damages than its pro-rata degree of fault. Under the facts of the case, by operation of law, there never was such exposure or risk.

The Court of Appeals in its review of MCL 600.2956, MCL 600.2957 and MCL 600.6304 and the supporting case law of *Kokx v Bylenga* 241 Mich App 655, 661; 617 NW2d 368 (2000); *Smiley v Corrigan*, 248 Mich App 51, 56; 638 NW2d 51 (2001) correctly analyzed that a defendant may not be liable for damages beyond a defendant’s pro rata share of liability. *Gerling v Lawson* 254 Mich App 241, 246-247; 657 NW2d 143 (2002) (40a). The Court of Appeals in interpreting the Statutes and affording the words there common and ordinary meaning opined that not only is liability of each defendant several and not joint; but also the principle of joint and several liability was replaced with “fair share liability”. In so doing, the liability of a party is limited to that parties own pro rata share of fault. The Court of Appeals correctly stated:

“Therefore, there is no longer a basis for a party to assert that it was exposed to liability greater than its pro-rata share, and parties in these instances are no longer entitled to contribution. For purposes of settlement, a party must assess its pro-rata share of liability in arriving at settlement amount; that is, the amount for which it could be found liable if the action were to proceed to trial. Under the 1995 Tort Reform legislation plaintiff was not exposed to liability beyond its pro-rata share;

therefore, plaintiff's decision to voluntarily pay pursuant to a settlement must be attributed to its own assessment of liability based on its insured's negligence."
Gerling, Id. at 247 (41a)

Such risk having been abolished by the adoption of the 1995 Tort Reform legislation and by the application of "fair share liability"; that the gravamen of a contribution action is completely absent, and as such, Plaintiff-Appellant did not have a cause of action for contribution.

Considering that contribution was commonplace prior to the passage of tort-reform, and there now has been approximately eight years application of the statutory amendments; it speaks for itself that the statutory provisions are straightforward and not of a complex nature with the result being there has not been a plethora of litigation seeking contribution. Meaning that the Statute and legislative intent are clear and unambiguous, that such action, with limited exception has been abolished. The Court of Appeals opinion correctly addressed the: statutory language, the intent of the legislature, and continued the implementation of the public policy of this State that each party assesses its own degree of fault and is never obligated to pay any sum greater than that it perceives to be its exposure.

That the abolishment of joint **and** several liability and that the liability of each defendant is several only, is not differentiated by the Contribution Statute where the language refers to jointly **or** severally liable as creating a distinction for contribution to exist. The term "joint and severable" refers to the type of exposure against the alleged tort-feasors where a party may be the only one joined in the action and be obligated to pay all damages that others may have contributed thereto several, or more than one party was joined in the action and paid a greater amount of its pro rata share. The use of the term "or" in the Contribution Statute only addresses the way in which the claim was brought against the party either jointly with others and they paid a greater pro rata share jointly or against that party individually paying a greater sum, that others may owe (several). The

distinction between the use of the terms “and”, “or” are completely consistent within the context in which each are incorporated within the statutory provisions. Plaintiff-Appellant’s argument in this regard is without merit.

There now exists three published Court of Appeals opinions discussing the abolishment of contribution and/or the legislative intent of tort reform legislation. Each of which concluding that the statutory provisions are clear and unambiguous and that the right of contribution, subject to the exceptions, has been abolished with the passage of the 1995 Tort Reform. Furthermore, the amendment of the Contribution Statute having deleted sub-section (b) of the former enactment further demonstrates in reading all the statutory provisions in harmony that the Legislature clearly enacted these provisions to abolish any claim for contribution. This also serves to eliminate any further unnecessary litigation. In effect, the public policy of this state is succinctly set forth in the statutes that a responsible party is only liable for its pro rata degree of fault which is now commonly referred to as “fair share liability.”

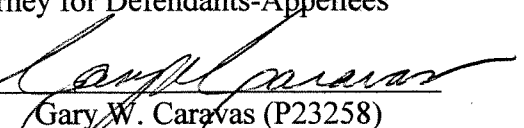
Plaintiff-Appellant must have considered it tactfully to its advantage to reach a settlement with the principle plaintiffs as well as a settlement in the case in which the Defendant-Appellees where Plaintiffs; then sue for contribution electing to proceed with the action as if the passage of the 1995 tort-reform provisions had never occurred. It is obvious by not naming Defendant-Appellee’s as involved non-parties that they never considered Defendant-Appellee’s to be truly involved, and it was not until after they had reached a settlement with Defendant-Appellee’s and a settlement figure with principle plaintiffs that it then thought it would be safe to try and recover some settlement money that it already had ear marked to pay. Now it has realized that the conscious decision that it made has not served it any benefit, it looks to this Honorable Court to shelter it from its own mistaken pre-trial strategy. All of which further demonstrates that the adoption of their interpretation

of the Michigan statutes is contrary to the purpose of the Michigan Tort-Reform Legislation. If a party truly is of the belief that others share in the common liability, then their remedy is simply to identify that party as an involved non-party and demonstrate through that proceeding the extent of each parties pro rata degree of fault. The Legislature specifically provided for this remedy to ensure that no party would pay a greater amount than its pro rata share or that which it assesses to be its own pro rata share. Even had there been a settlement without litigation the same assessment as to each parties own pro rata degree of fault would be undertaken among and between the parties as to whether or not the demand and offers are reasonable. But to follow Plaintiff-Appellant's suggestion is to reopen the flood gates which have been closed for approximately eight years in either having a defendant compelled to pay a greater sum than its pro rata degree of fault by way of the suggestion by the plaintiff that they can recover their sums back, or as in this situation where a defendant attempts to use pre-Tort Reform strategies to circumvent the statutory protection and bring about more litigation.

It is requested of this Honorable Court to affirm the Court of Appeals decision and to announce the public policy in this State is that no defendant shall be compelled, obligated or exposed to pay any sum greater than its pro rata share, and by not having any such obligation there does not exist any right to contribution; subject to the few exceptions set forth in the statute

Respectfully submitted:

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Dated: February 3, 2004

COUNTER STATEMENT OF FACTS AND PROCEEDINGS

A. Judicial Proceedings

A Complaint on behalf of Plaintiff-Appellant, the insurer and subrogee of the University of Michigan, was filed in the Circuit Court for the County of Washtenaw and assigned Case No: 99-11061 CZ. The Complaint seeks statutory contribution for a settlement that Plaintiff-Appellant entered into with Mr. Nicastri and the Conservator of the Estate of Mr. Ash arising out of a automobile accident that occurred on or about December 8, 1998. **(12a)** The Complaint is premised solely upon a provision of the Michigan Contribution Statute, MCLA 600.6925a. In answer to the Complaint, although not required in Defendant-Appellees' Answer by way of an Affirmative Defense, he/it did place the Plaintiff-Appellant and the Court on notice: "1. That the plaintiff has failed to state a cause of action upon which relief may be granted as to defendants." **(1b)**.

It is important to note that the Answer that was filed on behalf of Plaintiff-Appellant's insureds to the underlying complaint filed by Mr. Nicastri and the Estate of Mr. Ash, and at no time thereafter, was a notice of fault of non-party filed as provided in MCR 2.112 (K). Therefore, entailing that it recognized it was solely responsible as a defendant for the accident, and if there had been a jury trial the only party responsible for all damages would have been Plaintiff-Appellant, returned by the plaintiff's, to the extent applicable.

The automobile accident occurred subsequent to the adoption of several statutory provisions which had wide sweeping effects on the substantive and procedural reform of tort actions in the State of Michigan, those being: MCL 600.2956, MCL 600.2957, MCL 600.6304 and MCL 600.2925d. These Statutes read collectively abolished joint and several liability, giving rise to "fair share liability", subject to certain exceptions, which are neither pled nor being contended by Plaintiff-Appellant as being applicable to this action.

Defendant-Appellee's had filed a Motion for Leave **(3a)** for the Court to hear a Motion to Dismiss the Complaint because since the inception of Tort Reform, the action filed for contribution was not a recognized cause of action in the state of Michigan. The Motion for Leave was filed because it was subsequent to the Court's Scheduling Order for dispositive motions. The motion was denied **(36-37a)**.

With the Trial Court having denied the motion to bring this issue on for hearing Defendants filed the Application for Leave and Immediate Consideration together with a Motion to Stay Proceedings with the Court of Appeals. The Court of Appeals entered an order on November 21, 2001 granting the Application and Stay of Proceedings. Following briefing and oral argument the Court of Appeals issued a published decision on December 3, 2002. *Gerling v Lawson* 254 Mich App 241; 247-248; 657 NW2d 143 (2002). The Court ruled that under the statutory enactment of the 1995 Tort-Reform that contribution under the facts of this case is abolished as a matter of law: the Court of Appeals stated as follows:

The statutory provisions at issue are clear and unambiguous, as is the prior case law. *Smiley v Corrigan*, 248 Mich App 51, 56; 638 NW2d 51 (2001); *Kokx, supra*. The 1995 tort reform legislation abolished joint and several liability, replacing it with "fair share liability" in actions of this nature; the parties never become "jointly and severally liable in tort" as required by MCL 600.2925a. *Smiley, supra* at 54. The purpose of this legislation is to ensure that exposure to liability is limited to a party's own pro-rata degree of fault. *Id.* Therefore, there is no longer a basis for a party to assert that it was exposed to liability greater than its pro-rata share, and parties in these instances are no longer entitled to contribution. For purposes of settlement, a party must assess its pro-rata of liability in arriving at the settlement amount; that is, the amount for which it could be found liable if the action were to proceed to trial. Under the 1995 tort-reform legislation, plaintiff was not exposed to liability beyond its pro-rata share; therefore, plaintiff's decision to voluntarily pay pursuant to a settlement must be attributed to its own assessment of liability based on its insured's negligence. Plaintiff's claim for contribution based on its allegation that it made a payment greater than its pro-rata share thus cannot be sustained. *Gerling, Id.* 247-248, **(41a)**

B. History of The Subject Accident

This matter arises out of an October 21, 1997 automobile accident involving three motor vehicles. As a result of said accident, Judy Ash as Conservator of the Estate of Ricki Ash, a Legally Incapacitated Person, and James Nicastri, who was an occupant of the same vehicle, filed a lawsuit against the at-fault driver of the second vehicle, Barry Maus and his employer, Regents of the University of Michigan, for the injuries and damages they sustained. Neither the Conservator for Ricki Ash nor James Nicastri filed an action against Defendant-Appellee Cecil R. Lawson or American Beauty Turf Nurseries, Inc. The underlying action was filed in the Court of Claims being assigned Case No: 97-16852 CM. **(13a).**

The third vehicle involved was driven by Defendant, Cecil Lawson, and owned by Defendant, American Beauty Turf Nurseries, Inc. Mr. Lawson was also injured in the accident and filed suit against the Regents of the University of Michigan and Barry Maus, the operator of the vehicle owned by the University. As a result of the litigation he received compensatory damages for the bodily injuries caused by Plaintiff-Appellants subrogors.

Mr. Nicastri and the Conservator for Mr. Ash settled their claims against Barry Maus and the Regents of the University of Michigan in consideration for the payment of \$225,000.00 and \$2,036,237.00 respectively, being paid by Plaintiff-Appellant as the insurer of Barry Maus and Regents of the University of Michigan. It is from this payment which was made to those parties, that Plaintiff-Appellant now seeks contribution.

It was not until November 3, 1999 after Plaintiff-Appellant had settled all of the cases pending against its insureds, that it filed its Complaint as subrogee for recovery of these damages. **(12a).** At no time did Plaintiff's subrogors in the underlying case file a Notice of Fault of Non-Party as to these Defendants. As such, Plaintiff-Appellant's subrogors failed to preserve any determination

in that action as to an allocation of fault, and in effect its subrogors would be solely responsible for the damages, less any comparative fault to the extent it was raised and established as to the Estate of Ricki Ash and James Nicastrì.

ARGUMENT

- I. With the Passage of the 1995 Tort Reform Legislation: MCL 600.2956, MCL 600.2957(1), MCL 600.6304(1) Abolishing Joint and Several Liability Replacing it with Several Liability, Commonly Referred to as “Fair Share Liability” Ensures That Exposure to Liability Is Limited to a Party’s Own Pro-rata Degree of Fault. Since There Is No Longer a Basis for a Party to Assert That it Was Exposed to Joint Liability, a Settling Party May Not Claim Contribution. Furthermore, the 1995 Tort Reform Legislation Amended the Contribution Statute MCL 600.2925d and Deleted the Set off Provision Because a Payment by a Settling Party Is Only for its Pro Rata Degree of Fault. Therefore, Plaintiff-appellant Cannot Sustain That it Paid a Sum Greater than its Pro-rata Share and May Not Seek Contribution.

STANDARD OF REVIEW:

Questions regarding the interpretation and construction of Statutes are questions of law, which this Court reviews de novo. *Stozizki v Allied Paper Co.* 464 Mich 257, 263; 627 NW2d 293 (2001); *Kokx v Bylenga* 241 Mich App 655, 661; 617 NW2d 368 (2000).

COUNTER STANDARD OF REVIEW OF MOTION FOR SUMMARY DISPOSITION

Defendant-Appellee does not contest that the well recognized law in the State that for a motion filed pursuant to MCR 2.116(C)(8), the Court accepts all factual allegations as true. *Horace v City of Pontiac*, 456 Mich 744; 575 NW2d 214 (1998); *Simko v Blake*, 448 Mich 648; 532 NW2d 762 (1995). What it does contest, however, is that the mere conclusionary allegation that Plaintiff-Appellant paid more than its pro-rata share of liability constitutes a factual allegation. This is a conclusion that is not to be accepted as true since it does not constitute a factual allegation. Furthermore it is an erroneous allegation because the assessment that it made to make the payment could not, under the provisions of tort-reform, be based upon an exposure to liability beyond its own pro-rata share. The Court of Appeals in its decision succinctly stated:

“Under the 1995 tort-reform legislation, plaintiff was not exposed to liability beyond its pro-rata share; therefore, plaintiff’s decision to voluntarily pay pursuant to a settlement must be attributed to its own assessment of liability based on its insured’s

negligence. Plaintiff's claim for contribution based on its allegation that it made a payment greater than its pro-rata share thus cannot be sustained ." *Gerling, supra* 247-248 (41a).

From the facts that are alleged in the Complaint, it does not state a cause of action and its conclusion that it paid greater than its pro-rata share does not constitute a fact. Furthermore it is a legally incorrect statement since the adoption of 1995 tort-reform.

A. Joint and Several Liability Prior to the 1995 Tort-Reform.

Plaintiff-Appellant proceeded to resolve the case against its insureds as if it was operating under the pre-1995 tort-reform legislation. Prior to the tort-reform enactment, the law existed that if a plaintiff had been free from fault, then a defendant may have been held jointly liable for all damages even though a defendant may have only slightly contributed to the accident. If a plaintiff was at fault and one or more of the defendants did not have the sufficient resources to satisfy the judgment then the amount was shared among the various parties, including the plaintiff in proportion to the allocation of fault. PA 1996, No. 178 applying to MCL 600.6303.

What Plaintiff-Appellant apparently fails to recognize is that by the enactment of 1995 PA 161; 1995 PA 249, if it was not solely at fault, it could not have been held liable for the total damages. The enactment of PA 1995, No. 161, PA 1995 No. 249 clearly changed the prior Statute and the law in the State of Michigan. When MCL 600.6304 was amended by the 1995 Act, it specifically provides that the percentage of fault of all persons that contributed to the death or injury, even those released from liability and regardless of whether a person was or could have been named as a party to the action would be determined by the fact finder. MCL 600.6304(1)(b).

The import of this, is that under the former Statute only the parties before the Court actually had their degree of fault determined. Under the former MCL 600.6303 the Supreme Court in the matter of *Dept. of Transportation v Thrasher*, 446 Mich, 61; 521 NW2d, 214 (1994) interpreting this

statute concluded that it did not provide for the fact finder to determine the fault of the tortfeasors that had settled with the plaintiff. *Thrasher, supra* at 87. In addition, if the plaintiff was not at fault and one or more of the parties were uncollectible then the defendants remained jointly liable. If there was comparative fault on the part of the plaintiff and one or more of the defendants remained uncollectible then the loss was apportioned. In such a situation, a party could be responsible for paying more than its pro rata share and, therefore, may have a right of contribution against the other party and/or parties for whom it paid a percentage of damages for their liability. If the action was brought against only one defendant, and since the fault of non-parties were not to be determined, then that one defendant could be responsible for all damages less the plaintiff's comparative fault. In such a situation that party, if in compliance with the provisions of the former Contribution Statute, could seek contribution at a later date. This is precisely what Plaintiff-Appellant is attempting to do. But its attempts are based on the former law, not modern Tort-Reform.

B. 1995 Tort Reform:

Under the modern law, Plaintiff-Appellant has all the protection the legislature could possibly provide to it. MCL 600.2956, MCL 600.2957 and MCL 600.6304(4) expressly limits the liability to that of several, only. It also limits the liability of Plaintiff-Appellant, by a trier of fact determination as to the percentage of fault of all persons that contributed to the injury regardless of whether the person was or could have been named a party to the action, if the Plaintiff-Appellant chose to do so.

It is without question that a defendant cannot be held liable for damages beyond its pro rata share. This is dramatically different than the prior law. The Court of Appeals in *Smiley v Corrigan* 240 Mich App 51, 55; 638 NW2d 51 (2001) succinctly stated:

"As part of its tort reform legislation, the Michigan Legislature abolished and replaced joint and several liability with 'fair share liability'. The significance of the

change is that each tort-feasor will pay only that portion of the total damage award that reflects the tort-feasor's percentage of fault. Accordingly, if the fact finder concludes that a defendant is 10% at fault for a plaintiff's injuries and awards plaintiff \$100,000.00 in damages, the defendant will be responsible only for \$10,000.00, not the entire damage award, as would have been the case under the former joint and several liable system."

The *Smiley* court then went on to discuss the clear intent of the legislature by way of modification to a number of Statutes in the enactment to reflect the change in Michigan Civil Jurisprudence. *See Smiley, supra at 55-57*. It is important to note the significant changes. MCL 600.2956 provides that the liability of each defendant for damages is several only and is not joint. In a multiple tort-feasor situation each defendant's responsibility is only for that portion of the damage that is "in direct proportion of the person's percentage of fault." MCL 600.2957(1). This was subject to certain exceptions, which as indicated earlier do not apply.

MCL 600.2957(1) also sets forth:

"The trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party of the action.

MCL 600.6304(1) provides that the liability of each person is to be determined even those that have been released from liability under section MCL 600.2925d (Contribution Statute). Once again, regardless of whether the person was or could have been a named party to the action.

C. **Contribution Is No Longer A "Viable" Claim In The State of Michigan As It Relates To The Present Matter .**

Plaintiff-Appellant seeks contribution in its Complaint alleging it :

"has been **required** to pay more than its pro rata share of the common liability to Ricki Ash and James Nicastrì." (15a)(**Emphasis added**).

It further alleged it brought the lawsuit pursuant to MCL 600.2925a. (13a). This provision is a part of what is known as the Contribution Statute. The Complaint was filed after the passage of Tort Reform: in particular MCL 600.2956, MCL 600.2957, MCL 600.6304, MCL 600.2925d.

With the passage of Tort Reform, a tort-feasor is never obligated (**required**) to pay a greater share of that party's pro rata liability, and also there does not exist joint liability but rather several, only. The effect is that there is neither common liability for the entire damages sustained by a plaintiff nor a risk to pay an amount greater than his/its burden. As such, the allegation that Plaintiff-Appellant was: "**required to pay more than its pro-rata share,**" is an incorrect legal conclusion for there exists no such requirement since the 1995 passage of Tort-Reform. The Michigan Contribution Statute MCL 600.2925a(2) specifically provides for contribution only in situations where a tort-feasor **pays more** than his pro rata share of common liability. (Emphasis added).

In effect, these Statutes have abolished contribution. This was correctly recognized by the Court of Appeals through its interpretation of the unambiguous statutory provisions and the case law.

The *Gerling* Court stated as follows:

Under the 1995 tort reform legislation, plaintiff was never exposed to liability beyond its pro-rata share; therefore, plaintiff's decision to voluntarily pay pursuant to a settlement must be attributed to its own assessment of liability based upon its insured's negligence. Plaintiff's claim for contribution based on its allegations that it made a payment greater than its pro-rata share thus cannot be sustained." *Gerling, supra* at 247-248. (41a).

The Court of Appeals noted that when the Michigan Legislature enacted 1995 PA 161 and 1995 PA 249, it made several changes to the Revised Judicature Act: "including eliminating joint liability in various circumstances." See MCL 600.2956, MCL 600.2957 and MCL 600.6304; *Kokke v Bylenga*, 241 Mich App 655, 662; 617 NW2d 368 (2000). In support of this the Court of Appeals cited: MCL 600.2956, which provides:

Except as provided in section 6304, in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, **the liability of each defendant for damages is several only and is NOT joint.** (Emphasis added.) .

MCL 600.2957(1) further provides:

In an action on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated under this section by the trier of fact and, subject to section 6304, in direct proportion to the person's percentage of fault. In assessing percentages of fault under this subsection, the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action.

Moreover, MCL 600.6304 provides, in relevant part:

(1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than 1 person, including third-party defendants and nonparties, the court, unless otherwise agreed by all parties to the action, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating both of the following:

- (a) The total amount of each plaintiff's damages.
- (b) The percentage of the total fault of all persons that contributed to the death or injury, including each plaintiff and each person released from liability under section 2925d, regardless of whether the person was or could have been named as a party to the action.

* * *

(4) Liability in an action to which this section applies is several only and not joint. Except as otherwise provided in subsection (6), a person shall not be required to pay damages in an amount greater than his or her percentage of fault as found under subsection (1). *Gerling, supra*, 244-245 (39-40a)

The Court of Appeals recognized that the 1995 tort-reform legislation bars a party from making a claim for contribution, except in limited circumstances.¹ Since under the facts of this case the legislature enactments have abolished joint and several liability therefore any action for contribution has equally been abolished. That is to say, unless the claim is within one of the exceptions where joint liability has been maintained, which is not applicable here; that in a claim involving fault of more than one person there is no joint liability, and a defendant does not have

1. These circumstances include medical malpractice, crimes involving intentional conduct and vicarious liability. See MCL 600.1483, et seq and MCL 600.2955, where joint liability remains. Notably, the *Kokx* Court acknowledges these circumstances where joint liability remains and thus the Court reasoned that the legislature would have no reason to repeal §2925a, which provides for a right of contribution. *Kokx, supra*, at 662, 663.

exposure to liability that is greater than that party's pro-rata share. As such, contribution is no longer viable under the facts of this case. The Court of Appeals in citing *Kokx* stated as follows:

“The 1995 tort reform legislation applies to contribution claims; thus, contribution claims based on tort involving the fault of more than one person are no longer viable because there is no joint liability in those circumstances. *Kokx, supra at 663-664*. Specifically this Court has stated:

Under the plain and mandatory language of the revised statutes, a defendant cannot be held liable for damages beyond the defendant's pro-rata share, except under certain specified circumstances. Accordingly, in actions based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, as identified by the revised statutes, there would be no basis for a claim of contribution. Moreover, because joint liability remains in certain circumstances, the legislature would have no reason to repeal § 2925a, which provides for a right of contribution. [*Id. at 663*]

Further, this Court held: [T]o the extent that the statutes enacted as part of the legislature's 1995 tort reform do not allow a person to be held responsible for paying damages beyond the person's pro-rata share of responsibility as determined under § 6304, claims for contribution are no longer viable. [*Id. at 664*].” *Gerling, supra at 246-247 (40-41a)*.

The Plaintiff-Appellant's argument that it was required to pay a greater amount of its pro-rata liability is completely contrary to the statutory provisions. Its argument continues to be nonsensical when it goes on to say that since it paid more, it should be entitled to have a fact finder determine what its pro-rata degree of fault should be. Since there never was an obligation to pay in excess of its pro rata share it is illogical to suggest that it did pay a greater amount since its exposure was only limited to its pro rata degree of fault, and no more. The payment that it made was an assessment of its own liability and any suggestion otherwise is contrary to the protection provided by the statutory scheme that a party is never obligated to pay more than its pro rata share. Once it entered into the settlement, such further inquiry as to whether or not it paid a greater amount of its pro rata share would be an exercise in futility. Furthermore, when it had the opportunity to allege a non-party at fault, it did not do so. This was the opportunity to establish its degree of fault or at least to have

been assisted by way of a case evaluation panel. It elected to do neither. But setting this aside for a moment; since Plaintiff-Appellant's subrogees were the only named defendants a finding against them by a jury at a later date would only demonstrate that they were 100% at fault or some percentage as compared to the Plaintiff, only. This finding would have been the maximum amount it was required to pay. Since they settled if any amount was paid in excess as they now claim, it constitutes a voluntary payment to avoid having to present the question of damages to a jury. It was a settlement of its assessment of its insured's liability to bring finality to any further exposure its insured's may have had. It may well be that had there not been a settlement a jury would have found substantially greater damages than that which it settled for, thereby making it liable for even a greater amount. The settlement that it entered into, as stated by the Court of Appeals *at 248*: "must be attributed to its own assessment of liability based on its insured's liability." But also coupled with that was the benefit that it derived settling the case within its insurance coverage. Simply put it was never required to pay damages in an amount greater than its percentage of fault and as such, there exists no viable claim for contribution for another party to contribute to the assessment of its own liability.

It is also significant to note the learned comments of the committee as it relates to the retraction of the Standard Jury Instructions for contribution among tort-feasors by relative fault. The committee, in relying upon the statutory provisions and the *Kokx, supra*. decision, stated as follows:

In late 1995, the Michigan legislature abrogated joint liability in most cases and thereby eliminated most actions for contribution among tort-feasors:

Except as provided in section 6304, in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each defendant is several only and is not joint. However, this section does not abolish an employer's vicarious liability for an act or omission of the employer's employee. (Committee comments of May, 1998, regarding SJI2d 43.01B Contribution among Tort-Feasors by Relative Fault (bifurcation) **(13b)**)

The author's go on to address that MCL 600.6304(4) provided exceptions such as a medical malpractice action as well as certain defendants that have been found liable for acts or omissions that are set forth in MCL 600.6312. This committee had no difficulty in reading the clear and unambiguous language of the Statutes and the analysis and interpretation of those Statutes by the *Kokx* court. This is protection afforded to an alleged tort-feasor. If a party does not deem it is within its best interest to have a fact finder determine its liability as well as that of others in one proceeding, then it can proceed as Plaintiff-Appellant did, thereby assessing its own liability and recognizing that in so doing that the assessment it makes is only in accord that it is somewhere within its pro rata degree of fault. This is precisely what was announced in *Gerling, supra at 248*. For Plaintiff-Appellant to now come before this Supreme Court and suggest that it did otherwise, particularly since it never even identified any other alleged non-party at fault is completely disingenuous. This is further demonstrated in its brief at p 16 it states: "If it was tried, the verdict could have been anything, it could have been \$10,000,000.00." This insurer clearly assessed its insureds exposure particularly since it was the only defendant in the case and was not seeking any allocation of fault, so the only assessment it could be making is that as to its own insureds. Irrespective, even if it had made some mathematical computation it was still never obligated to pay more than it deemed to be its "fair share" of liability. But with this issue now before the Supreme Court it is requested of this Court to put an end to any such further attempts to protract litigation by ignoring the provisions of tort-reform, sitting on ones rights and then trying to resurrect a contribution argument that has been foreclosed for almost eight years.

D Plaintiff-Appellant's Erroneous Interpretation of the "to the extent" Language in the Kokx Opinion.

Plaintiff-Appellant's erroneously argues and misunderstands the phrase "to the extent" used in the *Kokx* opinion at page 664. It interprets the phrase to mean that it only involves a situation

where there has been a prior allocation of fault. (Plaintiff-Appellant's brief pg 14). To demonstrate that Plaintiff-Appellant's interpretation is not embodied with the *Kokx* decision, let us look at the complete sentence in the opinion which reads as follows:

“Therefore, we hold that to the extent of the statutes enacted as a part of the Legislature's 1995 tort-reform do not allow a person to be held responsible for paying damages beyond the person's pro-rata share of responsibility as determined under 6304, claims for contribution are no longer viable.” *Kokx*, 663, 664.

The *Kokx* court is clearly setting forth that the Statutes provide for several liability only, and paying for only one's pro-rata share abolishes contribution. As mentioned, however, exceptions have been carved out which maintain joint liability in medical malpractice actions and in special circumstances where the Legislature sets forth specific exceptions. See ft. n1. As to those exceptions, contribution is not abolished. The language: “to the extent”, refers specifically to those situations in which a party is no longer jointly liable for his pro rata share of fault. That is to say, a distinction is made between the exceptions where a tort-feasor may be jointly liable and those situations where a tort-feasor is only severally liable. By doing so, it recognized that there are situations in which contribution may be sought. Those are the actions contained within the exceptions. To the extent the cause of action is not within the exception then contribution is abolished. It is such a straightforward and clear presentation it is difficult to fathom how Plaintiff-Appellant can try and convolute the use of that term for its own ends. The phrase simply does not mean what it has argued to this Court. In effect, Plaintiff-Appellant's argument that this language infers that if there has been no allocation and a party pays more than its pro-rata degree of fault, a claim for contribution may lie. This is a complete misreading of the *Kokx* opinion. In fact, the quote is very specific that unless the claim falls within an exception allowing for joint liability, then an action for contribution is abolished by law. What is interesting to note is that Plaintiff-Appellant has avoided any discussion about the exceptions. Furthermore, as indicated in this brief when

reading the statutory provisions in harmony it is clear the Legislature abolished contribution except as to the specific exceptions. If the Legislature intended contribution to exist as a viable cause of action, as Plaintiff-Appellant suggest, the Legislature would have specifically stated so for situations where a party enters into a settlement. It is obvious, it was not included because to allow contribution in several liability situations, where a party is obligated only to pay its pro-rata share, would be completely inconsistent that a party in this State of Michigan is never liable or required to pay an amount greater than its pro-rata share.

Plaintiff-Appellant recognizes that statutory construction is to discern and give effect to the legislative intent, *Robertson v Damiler Chrysler Corp* 465 Mich 732, 748; 641 NW2d 567 (2002); that where the language is unambiguous, the Court must presume that the Legislature intended the meaning clearly expressed such that there is no further judicial construction required or permitted. *TRYC v Michigan Veterans' Facility*, 451 Mich 129; 135, 545 NW2d 642 (1996); that the Court must give the words of a Statute their plain and ordinary meaning and only where the statutory language is ambiguous may the Court look outside the Statute to ascertain the Legislature's intent. *Turner v Auto-Club Ins Ass'n* , 448 Mich 22, 27; 528 NW2d 681 (1995). If Plaintiff-Appellant suggests there are two interpretations to be given to the Statute, then this Court may determine the legislative intent by reading the Statute in its entirety and in harmony in looking to the purpose and objectives sought to be accomplished by the legislation . *Miller v CA Muer Corp*, 124 Mich App 783-784; 446 NW2d 904 (1983) *rev'd on other grounds* 420 Mich 355, 362 NW2d 650 (1984) citing *Bennetts v State Employees Retirement Board*, 95 Mich App 616, 622; 291 NW2d 147 (1980). After recognizing most of these sound principles, it then attempts to take the *Kokx* opinion and the others cited in this brief that specifically find the Statutes to be unambiguous, written in clear and

intelligible terms,² and a distinction between the situation in which a party may be jointly liable to those where a party may be severally liable; and then convolutes the opinions and argue that the language, “to the extent” applies to where there has not been an allocation of fault. Nowhere in the statute or in the *Kokx* opinion can any such interpretation of that phrase as offered by Plaintiff-Appellant be gleaned. It’s argument does not in anyway follow that this is what was meant by the *Kokx* court. The Court without question is referring solely to the exceptions.

E: Analysis of The Contribution Statute And Its Fundamental Requirements

Plaintiff-Appellant, does not come within the parameters of the a Contribution Statute. The Contribution Statute in part requires that a person must be jointly or severally liable for the same injury and to have paid more than his pro rata share, and discharging a common liability. MCL 600.2925a(1)(2). The Statute is explicit that there must be "common liability". It reads in part as follows:

Sec.2925a. (1) Except as otherwise provided in this act, when 2 or more persons become jointly or severally liable in tort for the same injury to a person or property or the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

(2) The right of contribution exists only in favor of a tort-feasor who has paid more than his pro rata share of the common liability and his total recovery is limited to the amount paid by him in excess of his pro rata share. . . . MCL 600.2925a(2); MSA 27A. 2925a(2).

As already briefed, there exists no joint liability but rather several liability. In the matter of *Caldwell v Fox*, 394 Mich 401, 417; 231 NW2d 46 (1975), pre tort-reform, the Supreme Court announced the general rule regarding contribution. It stated in part as follows:

"The general rule of contribution is that one who is **compelled** to pay or satisfy the whole or to bear more than his aliquot share of the **common** burden or obligation, upon which several persons are equally liable or which they are bound to discharge,

2 Smiley v Corrigan 248 Mich App 51, 57-58, 638 NW2d 51 (2001)
Gerling V Lawson 254 Mich App 241, 247-248; 657 NW2d 143 (2002)

is entitled to contribution against the others to obtain from them the payment of their respective shares."(Emphasis added).

The very statement in and of itself solidifies that under the 1995 tort-reform, contribution has been abolished. Plaintiff-Appellant would never have been **compelled** to pay more than its pro rata degree of fault. This is precisely what tort reform accomplished. Others are not equally liable because the statutes referenced in this brief are specific that persons liable for damages are not equally one in the same with another, but rather, each person is responsible solely for the damage that they caused. The *Caldwell* court went on to discuss the term "common liability" as follows:

"If the jury believes that both original defendants and the third-party defendant were responsible for the injuries to the plaintiff, then a basis for allowing contribution would exist. All the defendants would share a common liability to the plaintiff because the type of injury suffered by the plaintiff **are not apportionable amongst the various defendants on any rational basis**. Where two or more individuals are responsible for an accident which produces a single indivisible injury, **each individual wrong doer may be held liable for the entire amount of the damages and thus each of the defendants shares a common liability with the others that are also responsible for the injury.**" *Caldwell, supra*, 420 FN5. (Emphasis added).

It is important to understand that what the *Caldwell* Court is actually referring to when it references "common liability," it is speaking in terms of **non-apportionable damages**, that is to say, joint **and** several liability, which was the rule prior to tort-reform.

The matter of *Moisenko v Volkswagen AG* 10 F.Supp. 2d 853 (W.D. MI. 1998) discussed the general principles of contribution. Although, the Court found that there was no right to contribution on other grounds, what it had to say about the doctrine is most enlightening based upon a review of State and Federal cases. The court stated in part as follows:

"Thus, to state a cause of action for contribution, plaintiff must show that: (1) common liability exists among the parties; and (2) the tortfeasor is exposed to greater liability for damages than would be its pro rata share." *Moisenko, Id. at 855 (10b)*.

In that case, Volkswagen was unable to pursue contribution because a court found that it was not in danger of paying more than its fair share of the damages alleged because of the nature of the

damages being claimed against it. Although the Moisenko court did not address the question of common liability it did recognize the second component of a contribution claim is that the party must be in danger of paying more than its fair share of damages alleged. Plaintiff-Appellant never faced, nor could it face such exposure, due to the clear meaning of the enactments.

Although Defendant-Appellee dispute that there exists common liability, the Contribution Statue nonetheless requires that each component be established. The Contribution Statute, also requires joint or several liability. But as discussed in *Moisenko, Id.* the tort-feasor must be exposed to greater liability for damages than would be its pro rata share. This is significant because this element dovetails not only into the joint or several liability requirement under MCL 600.2925a(1) but also, under sub-section (2) which requires a person to show that it paid more than its pro rata share. **Certainly, if liability is solely severable under Tort Reform, which it is, and the Statutes set forth a person shall not be required to pay damages in an amount greater than his or her percentage of fault; that same person then is unable to establish that it was exposed to greater liability than its pro rata share. Its exposure to liability is solely limited to its own pro rata degree of fault.** MCL 600.2956, MCL 600.2977(1), MCL 600.6304(4).

The fallacy of Plaintiff-Appellant's argument is that it had such an exposure and, therefore, it resolved the case in total. It did not have such an exposure and it can never establish that it was either compelled or obligated as announced in *Caldwell, supra at 417*, to pay more than its pro rata share. It had the protection of tort reform to ensure that its exposure and/or risk was solely limited to its own pro rata degree of fault. As such, Plaintiff-Appellant is unable to establish: that it became liable jointly or severally for common liability (joint liability to the principal plaintiffs) exposing it to liability greater than its pro-rata share, and compelling it to pay a greater amount than its pro rata share.

The Court of Appeals correctly assessed the same argument that Plaintiff-Appellant now raises on Appeal. It stated as follows:

“We find plaintiff’s argument unpersuasive. The statutory provisions at issue are clear and unambiguous, as in the prior case law. *Smiley v Corrigan*, 248 Mich App 51, 56; 638 NW2d 51 (2001); *Kokx, supra*. The 1995 tort reform legislation abolished joint and several liability, replacing it with “fair share liability” in actions of this nature; the parties never become “jointly and severally liable in tort” as required by MCL 600.2925a. *Smiley, supra* at 54. The purpose of this legislature is to ensure that exposure to liability is limited to a party’s own pro-rata degree of fault. *Id.* Therefore, there is no longer a basis for a party to assert that it was exposed to liability greater than its pro-rata share, and parties in these instances are no longer entitled to contribution. For purposes of settlement, a party must assess its pro-rata share of liability in arriving at the settlement amount; that is, the amount for which it could be found liable if the action were to proceed to trial. Under the 1995 tort reform legislation, plaintiff was not exposed to liability beyond its pro-rata share; therefore, plaintiff’s decision to voluntarily pay pursuant to a settlement must be attributed to its own assessment of liability based on its insured’s negligence. Plaintiff’s claim for contribution based on its allegation that it made a payment greater than its pro-rata share thus cannot be sustained.” *Gerling, supra*, 247-248.(41a).

i. Plaintiff-Appellant’s argument attempting to distinguish the term “and”, “or” is without merit.

In *Markley v Oak Health Care*, 255 Mich App, 245; 660 NW2d 314 (2003) the court in discussing joint and several liability stated as follows: “ with joint and several liability, each tort-feasor is liable for the full amount of damages.” *Markley, Id* at 251. It went on to discuss the roots and the concept of joint and **several liability**, in citing *Verhoeks v Gillivan* 244 Mich 367, 371; 221 NW2d (1928) it quoted what is referred to as the “American Rule” regarding one injury and a single recovery. The import of this quote demonstrates that when the term joint and several is used, it is in the context that one party joined in an action with another may be called upon to pay all the damages. Furthermore, if there are two or more tort-feasors a plaintiff may bring an action against one tort-feasor which is referred to as several liability. That single tort-feasor in the action would be responsible for all damages. The significance of this is that in joint liability if more than one party contributes to the common injury then all may be collectively liable but plaintiff may elect against

whom he proceeds or for whom he collects the judgment. The “several” aspect of it refers to the situation where only one tort-feasor has an action brought against him or is joined with others but execution may lie against him only by the plaintiff. *Verhoeks, Id.* at 371 stated as follows:

“The American cases offer equitable and convincing reasons for their course. Viz.; The liability of tort-feasors for a joint tort is joint **and** several. The injured party has the right to pursue them jointly **or** severally at his election, and recover separate judgments; but, the injury being single, he may recover but one compensation. Therefore, he may elect *de melioribus damnis* and issue his execution accordingly, but if he obtains only partial satisfaction he has not precluded himself from proceeding against another cotort-feasor; his election of first judgment concluding him on as to the amount he may receive, and whatever has been paid must apply *pro tanto* upon his further recovery.” (Emphasis added).

The *Markley* court went on to say:

“Under established principles of joint and several liability, where the negligence of two or more persons produce a single, indivisible injury, the tort-feasors are jointly and severally liable despite there being no common duty, common design, or concert of action.” *Markley* at 252.

The import of this is to demonstrate to the Court that Plaintiff-Appellant’s criticism about the Court of Appeals referring to “joint **and** several” as it relates to contribution, but where the statute is framed in terms of “when two or more persons become jointly **or** severally liable in tort for the same injury” is without merit. MCLA 600.2925 (a)(1) (Emphasis added). What Plaintiff-Appellant fails to recognize is that the use of the term joint **and** several is used in the broad context that when more than one party is responsible for a single injury, then at the option of the plaintiff he can either sue one or more of the parties and determine from whom he elects to satisfy either all or part of the judgment. That is to say, the legal phrase for the type of liability against those parties is: joint and several. He has the right, however, to bring the action against them either jointly **or** severally and still collect all from one or more of the parties. If the plaintiff pursues the action against one party that is referred to as several liability. But in that situation under pre-tort reform, that party may then seek to recover that which he paid in excess of his pro rata share. This is

because the liability for the tort when coupled with another is joint **and** several. In effect as discussed by *Verhoeks, Id. at 371* the liability of the tort-feasors for a joint tort is referred to as: “joint **and** several.” This is because they share a joint common liability.

In the Contribution Statute where it refers to “joint **or** several liability” is solely addressing a situation where there was a joint **and** several right of recovery. The tort-feasor seeking contribution, however, may have been claimed against or sued **jointly** with others and a payment was made; alternatively a claim was made or an action was brought against that tort-feasor severally and a payment was made. Since there are at least two different scenarios under which a tort-feasor, under tort-reform could be called upon to pay a single obligation that may be shared by many, the Contribution Statute allows for this contingency by using the phrase jointly **or** severally. (See exception fn 1). The requisite element, however, is that the party against whom contribution is sought is also jointly liable. Recall, that if a plaintiff in a situation involving multiple wrong doers who are jointly liable, elects to bring the action against only one, or collects as to one only, that action is referred to as pursuing that tort-feasor, severally. As such, Plaintiff-Appellants distinction is completely without merit. The Legislature was very precise that contribution was not limited only to cases where all tort-feasors were joined together for joint liability, but rather also encompassed the situation where the plaintiff elected to sue or collect from only one tort-feasor who was jointly liable with others, thereby being severally liable. This, however, did not preclude the severally liable tort-feasor from seeking contribution against one or more other tort-feasors, each of which would be severally liable and collectively being jointly liable. As such, the Court of Appeals use of the term “**joint and several**” is absolutely appropriate in its opinion. Plaintiff-Appellant, simply misunderstands the concept of joint and several liability. For purposes of contribution it translates as to just how a party may have either been joint **or** severally liable to the plaintiff for which that

party seeks contribution from another tort-feasor. There must be, however, the common element of common liability or that is to say joint liability between those parties.

In fact, Plaintiff-Appellant recognizes that there must be joint liability for there to be contribution. The Court is referred to p 8 of their brief where it specifically sets forth joint liability as an element for contribution in accordance with *Reurink Brothers Star Silo Inc, v Clinton County Road Comm'*, 161 Mich App 67, 72-73; 409 NW2d 725 (1987). The *Reurink* court, interpreting the Contribution Statute at § 2925 states there are six elements that the plaintiff must allege and prove where it has settled the underlying action. Those are worth repeating: (1) there must be **joint liability** on the part of plaintiff and defendant; (2) the plaintiff must have paid more than the plaintiff's pro-rata share of the common liability; (3) the settlement entered into by the plaintiff must extinguish the liability of the defendant; (4) a reasonable effort must have been made to notify the defendant of the pendency of the settlement negotiations; (5) the defendant must be given a reasonable opportunity to participate in the settlement negotiations and (6) the settlement must be made in good faith.

Recall that the Contribution Statute requires at 2925 a (1) the liability whether it be joint or several must be: **"for the same injury to a person."** In § 2925a (2) there must be: **common liability**. As discussed in *Caldwell, supra* at 417 and *Reurink, Id* at 72-73, there must be a common burden or common obligation by the party seeking contribution and by the party from whom contribution is sought such that collectively there existed joint liability whether a party was sued with others jointly or paid the claim severally matters not as it relates to the original plaintiff. The Contribution Statute, however provides for either contingency by use of the term **"or."**

As such, the general phrase of joint **and** several liability as to the obligation owed to the principal plaintiff embodies that the tort-feasors may have been called upon to make a payment

jointly **or** severally. One term refers to the liability owed to the plaintiff, the other term in the Contribution Statute identifies the manner in which a party may have made the payment. As such, Plaintiff-Appellant's argument is a claimed distinction without a distinction.

But let us for a moment revisit MCL 600.2956. It states:

Except as provided in section 6304, in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability for each defendant for damages is **several only** and is not joint. However the section does not abolish and employer's vicarious liability for an act or omission of the employer's employee.

The Legislature clearly drew a distinction from the former law that party does not share in the common liability of owing all damages to the plaintiff. Rather, that party stands alone without the burden of any other parties negligence being placed upon it. Tort-Reform continues at MCL 600.2957 (1) that the liability is in direct proportion to the person's percentage of fault, and is also addressed at MCL 600.6304.

F. 1995 Tort-Reform Amendment to the Contribution Statute

It is important, to look at the Contribution Statute in its entirety. The reason being, is that statutory provisions are to read in the context of the entire Statute so as to produce a harmonious whole. *Weems v Chrysler Cort*, 448 Mich 679, 699-700; 533 NW2d 287 (1985). Up to this point Plaintiff-Appellant has focused on MCL 600.2925 (a)(1)(2). What Plaintiff fails to do is refer to the Statute as a whole including the amendment that took place at the time of the Tort Reform enactment that clearly demonstrates the Legislatures intent to abolish contribution except as to those limited circumstances in which joint liability was not abolished. ³ Let us look at the provision in the Contribution Statute that was amended as part of the tort-reform enactments being MCL 600.2925d. This section refers to a release or covenant not to sue and the effects thereof. MCL 600.2925d as

3. Subject to exceptions previously noted. (See footnote 1).

amended by 1995 PA 161 currently provides as follows:

If a release or covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons that for the same injury or the same wrongful death, both of the following apply: (a) The release or covenant does not discharge or more of the other persons from liability for the injury or wrongful death unless its terms so provide. (b) The release or covenant discharges the person to whom it is given from all liability for contribution to any other person for the injury or wrongful death.

This Statute, before it was amended included a significant sub-section that was deleted with the tort-reform legislation. The deleted provision was the former sub-section (b). The deleted paragraph provided in part as follows:

"It reduces the claim against the other tort-feasors to the extent of any amount stipulated by the release or the covenant or to the extent of the amount of the consideration paid for it, whichever amount is the greater."

What is significant is that the legislature deleted the sub-section that previously provided for reducing the claim against the other tort-feasors to the extent of the amount either stipulated or paid as a consideration. The rational reason for deleting this is because under the former law, if a person entered into a settlement it did not bar the plaintiff's claim against other joint tort-feasors. Who remained jointly and severally liable for the damages plaintiff sustained. It has long been recognized in Michigan that an individual with one injury is not allowed to receive recovery beyond the actual loss. *Verhoeks, supra* at 371. In *Great Northern Packaging, Inc v General Tire and Rubber Co* 154 Mich App 777, 781; 399 NW2d 408 (1986) which predates the Tort Reform legislation, it discussed the common law rule regarding set-off and stated as follows:

As a general rule, only one recovery for a single injury is allowed under Michigan Law. The amount that a plaintiff recovers from one defendant is set off against a subsequent verdict obtained against a codefendant. *Stitt v Mahaney*, 403 Mich 711; 272 NW2d 526 (1978).

As such, there existed a common law rule for set off. This all begins to come together when we consider that the Legislature during the passage of the 1995 Tort-Reform Legislation deleted the

former sub-paragraph (b) that specifically allowed set off. It is not that Michigan now allows a plaintiff to recover more than his actual damages, but rather by deleting the provision was absolutely consistent with the Legislatures enactment that a tort-feasor is only liable for his pro rata share of liability. There exists no reason to deduct the amount a party paid from any pro rata share that another party may owe. This is because each tort-feasor only has liability for its pro rata share. Prior to Tort-Reform when a party was jointly and severally liable and another party paid a portion of plaintiff's damages it was consistent with Michigan Law that that portion be deducted from plaintiffs actual damages. This reduced plaintiffs claim pro tanto with a sum already paid.

Under the modern tort reform, enacted in 1995 a person may not be subject to joint liability. But rather, the person's exposure is only for its several liability based upon the pro rata degree of fault. As such, since it is several liability there would exist no basis to reduce a claim against another party by an amount of money paid by the tort-feasor since that payment represented only that person's pro rata degree of liability. The removal of the former Statute's sub-section (b) is in complete harmony with the purpose that the legislature set about to accomplish. That is: each tort-feasor will only pay that portion of the total damage that reflects the tort-feasor's percentage of fault.

As between Plaintiff-Appellant and, the principal plaintiffs, the Conservator for Ricki Ash and James Nicastri, it always remained the principal plaintiff's burden to prove the fault of Plaintiff-Appellant. Irrespective that the principal plaintiff may have discharged Plaintiff-Appellant's insureds, and others it matters not, for apparently the principal plaintiffs felt satisfied that they made the recovery against the party that they felt to be culpable and responsible for the injuries and/or damages. As for including others in the release, it may have been purely for expedience and involved giving up a claim, which in reality was giving up nothing at all. The only liability that Plaintiff-Appellant insured had to the principal plaintiffs was for their several liability, only, and

never had exposure beyond that - unlike the former law. The Plaintiff-Appellant's decision to pay was to resolve the liability against it, and the only liability that it faced was for its insured's own negligence, alone, and no more.

Just as an aside, the matter of *Markley, supra* discussed the amendment to the Contribution Statute and the deletion of subparagraph (b). That particular case involved a medical malpractice action which is within one of the exceptions where there remains joint and several liability. The *Markley* panel discussed the common law rule of set off and that the former subsection (b) which was in MCL 600.2925d, 1974 PA 318 recognized that the set off provision was a codification of the common law rule. *Markley at 255*. It went on to discuss that with the passage of the 1995 Tort Reform Legislature that most situations joint and several liability was abolished in favor of allocation of fault and there was no need for a set off provision. The Court stated as follows:

There would be no need for a set off because the tortfeasor-defendant not involved in the settlement would necessarily be responsible for an amount of damages **distinct from the settling defendant on the basis of allocation of fault**. Therefore, a settlement payment cannot be deemed to constitute a payment toward a loss included in a later damage award entered against the non-settling tortfeasor. *Markley at 255*. (Emphasis added)

But to continue to demonstrate the harmony of the amendment of the Contribution Statute in light of Tort-Reform the *Markley*, panel went on to discuss a situation involving medical malpractice, which is one of the exceptions to the abolishment of joint and several liability. The *Markley* court recognized that there remained joint and several liability under the facts of that case but also that the set off provision had been deleted from the Contribution Statute. As previously discussed the deletion was in complete harmony with the Tort-Reform revision of allocation of fault. But, also in a medical malpractice situation where joint and several liability still exists the court found this deletion of sub-paragraph (b) to also remain in complete harmony because it revived the common law rule of set off as it applies to those limited situations where joint and several liability

remains. The *Markley* court stated as follows:

The comprehensive tort-reform legislation, however, simply no longer addressed the issue of setoff in any manner; it is silent. Moreover, the tort reform legislation prescribed in detail a course of conduct regarding allocation of fault and several liability, not joint and several liability. Therefore, joint and several liability principles presumptively remained in tact, where, as here, joint and several liability was not abrogated by the legislature. With tort reform and the switch to several liability, it is logical to conclude the common-law setoff in joint and several liability cases remained the law, where the new Legislation was silent, where application of a common-law rule does not conflict with any current statutes concerning tort law, and where a plaintiff is conceivably overcompensated for its injury should the rule not be applied. Considering the general nature and tone of tort-reform legislation, we conclude that the Legislature did not intend to allow recovery greater than the actual loss in joint and several liability cases when it deleted the relevant portion of section 2925d, but instead intended that common-law principles limiting a recovery to actual loss would remain intact. *Markley, supra* 256-257.

The import of this is that in reading the Contribution Statute as a whole it becomes clear that the Legislature recognized that the principles of setoff would not apply to the passage of Tort Reform where joint liability was abolished and a party would never be exposed to liability beyond its pro rata share. Furthermore, it would be inconsistent for a party to make a payment then claim it had paid beyond its pro rata share when there was no obligation under the law for that party to have made such a payment. The payment is made solely upon that party's assessment of liability, and in this situation the insurer's assessment of its insured's percentage of negligence as it relates to whatever evaluation that insurer placed upon the case.

Insurers routinely evaluate what plaintiffs damages may be. With the passage of Tort-Reform, which has been in place for approximately eight years, they have been evaluating their insureds percentage of those damages. From that initial evaluation the insurer determines whether or not a negotiated figure is fair and reasonable for purposes of buying peace. But that decision is made upon the assessment of its own insureds percentage of fault compared to an estimated total value of plaintiffs claim. That insurer or party is never obligated to pay more than its pro rata share

under the Law in the State of Michigan. This was recognized by the Court of Appeals in its well reasoned opinion. *Gerling, supra at 247-248. (41a).*

G. The CSX Decision

Plaintiff-Appellant's argument relies upon the CSX *Transportation Inc v Union Tank Co, 173 F Supp2d 696, 700 (ed Mich 2001)* decision from a Federal District Court Judge in Michigan. The opinion does not address the general principles of contribution that a party seeking contribution, prior to the passage of the 1995 tort-reform legislation had to be exposed to liability greater than its pro-rata degree of fault. That is to say joint and several liability.

The District Court erroneously reached a decision without fully addressing the legal issues. As this Court is aware, Federal District Court opinions regarding Michigan Statutes although are considered, they are not binding precedent, but more importantly it is the Michigan Supreme Court that has: "the ultimate responsibility for determining a question of state law." *People v Antkowiak 242 Mich App 424, 437; 619 NW2d 18 (2000) quoting In Re: Apportionment of State Legislature-1982, 413 Mich 96, 116, n11; 321 NW2d 565 (1982).* Plaintiff-Appellant correctly points out to this Court that the Federal District Court did not even address what arguments the Defendants in that case presented to it. There was no requirement of the Court of Appeals to address such an erroneous opinion that is completely contrary to the legislative intent that a party is no longer exposed to liability greater than its pro-rata share of fault. The Michigan legislature and its courts have taken great strides in rectifying and making the tort recovery process based upon "fair share liability" the public policy of this State. Perhaps Plaintiff-Appellant is reluctant to change and certainly the CSX opinion by the Federal Judge attempts to maintain the pre 1995 tort-reform status quo. The opinion does not, however, recognize the direction that the legislature and the courts in this State are taking; that a party should be called upon and should assess only the degree of fault related to that party.

As the Court of Appeals correctly stated: “Therefore, plaintiff’s decision to voluntarily pay pursuant to a settlement must be attributed to its own assessment of liability based on its insured’s negligence.” *Gerling, supra* 247-248 (41a).. The District Court has misconstrued the Michigan Tort Reform legislation in its opinion that if the legislature intended to abolish contribution it would have been repealed by legislation. *CSX, supra*, 700 . This was the same argument rejected by the Court of Appeals in the *Kokx* decision. The Court of Appeals opined that there would be no reason to repeal section 2924(a) of the Contribution Statute because joint liability remained under certain circumstances. *Kokx, supra* at 663. Then as a follow-up as it relates to the deletion of sub-section (b) in the former § 2925 the Court of Appeals in *Markley* explained the rationale for the removal of that sub-section which thereby revived the right of set-off under the common law. All of which has been discussed earlier in this brief.

Although *CSX, supra* at 699 recognizes that statutory provisions are to be read *in pari materia* it did not do so. Furthermore the entire statutory provisions are to be read to produce a harmonious whole. *Kokx, supra* at 662 citing *Weems, supra*, 699-700 and the judicial interpretation of Statutes is to ascertain and give effect to the intent of the legislature. *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 612 (1998). The District Court failed to analyze the complete Contribution Statute and particularly the fact that MCL 600.2925(d) which refers to a release or covenant not to sue was amended at the time of the adoption of Tort-Reform. Earlier in the brief it has been set forth how this provision is read in harmony with tort-reform. The District Court, however, did not address this significant issue with its analysis of the interrelationship of the various statutory provisions.

Finally, the District Court is in error in its interpretation of 600.2925(a). The Statute in part requires: “When two or more persons become jointly or severally liable in tort for the same injury

to a person. . . ,” means that whether the party is jointly liable or severally liable, its liability is for the entire amount of damages, or prior to the enactment of tort-reform (assuming there was comparative fault as to the plaintiff) a party would be responsible for its pro rata share but also for an additional amount based upon the percentage of fault for any sums that was uncollectible from any other defendant. In either situation the tort-feasor could be responsible for the total damages or an amount in excess of his degree of fault. Now, however, a tort-feasor, subject to exceptions stated earlier, has the statutory protection of never being compelled or obligated to pay a sum greater than its pro rata share. The District Court opinion was unable to sever the link that under the modern law a party may never be responsible (subject to the exception) for a sum greater than its pro rata degree of fault. The Court also did not harmonize the last sentence of 2925(a) where it refers to: “a right of contribution among them even though judgment has not been recovered against all or any of them.” To harmonize this sub-paragraph would entail that contribution would still exist if there was a judgment by carving out the exception with use of the term: “even though judgment has not been recovered.” The Plaintiff-Appellant must acknowledge that there would exist no right of contribution if a judgment against it had been entered since it would have been for its pro rata share. This further demonstrates in reading the Statute in its entirety that the legislature did not intend contribution to apply to situations as now before the Court because as to the very nature of the sentence it entails that contribution may be had as a result of a judgment, involving those who are now severally liable. Such reasoning would be completely inconsistent with a party being responsible for only its percentage of fault.

H. Tort-Reform Does Facilitate Settlements

The suggestion that the abolishment of contribution does not facilitate a settlement is without merit. Parties have been routinely assessing their exposure and reaching amicable resolutions since

1996, the effective date of the Tort Reform Legislation.⁴ There has been no opening of the flood gates of litigation concerning parties seeking contribution after a settlement. Considering the passage of almost eight years Plaintiff-Appellant is unable to demonstrate in any way to this Court that the settlement process has been undermined by the Tort Reform legislation such that a vast majority of cases now proceed to trial. This is simply not the situation. The Legislature did maintain those provisions in the Contribution Statute assuring a settling plaintiff, as before, that they may enter into a settlement and still maintain a cause of action against other tort-feasors for each tort-feasor's respective pro rata degree of fault. MCL 600.2925(d).

Modern tort-reform reduces litigation because the Court's are not confronted with basically the same factual action being filed and tried among and between parties for contribution. There is no rational basis and track record to suggest that the adoption of tort-reform and abolishment of contribution has thwarted the settlement process. Adjustments are made, liability is assessed by each party and cases continue to be amicably resolved. The statutory intent is for the parties to pay only its pro-rata share. To follow Plaintiff-Appellant's approach, is to encourage the law as it existed before, that is : the plaintiff treating the defendant as if it owed all of the damages, subject to its right of recovery back from others and making the demands accordingly. Likewise for a defendant to feel compelled to pay more than its pro-rata share with hopes of recovering some of its money back from others; or as in this situation where a party did not consider it within its best interest to file a notice of non-involved party and was the only party against whom Plaintiff was making a claim decides to settle to protect its own well being and then, for what it may consider to have been its better strategy, to have the underlying Plaintiff out of the case in an attempt to proceed with a contribution action.

4. P.A. 1961, No: 236, § 2956, added by P.A. 1995, No: 161, § 1, effective March 28, 1996.
P.A. 1961, No: 236 § 2957, added by P.A. 1995, No: 161, effective March 28, 1996 amended by P.A. 1995, No: 249 § 1 effective March 28, 1996

What the Plaintiff has managed to do is not only have the first lawsuit against it, but now has burdened the Court with an unmeritorious contribution claim and suggest to this Court that this is a better pattern to protect public policy. What it is asking of this Supreme Court is to ratify its trial strategy by completely ignoring the identification of a non-party as provided in § 600.2957(2), MCR 2.112 and proceeding as if the Tort-Reform Legislation was never passed and the Contribution Statute was never amended.⁵ Such a scenario flies directly in the face of the intent of the legislature of each party assessing liability, unfettered by demands and threats against it that may require a defendant to pay more than its share of liability and then set about to recover money back. There being no right to contribution such leverage may not be used against a defendant of paying a greater amount. It appears that Plaintiff-Appellant has difficulty in accepting that this is the modern approach of limiting one's exposure not only in the direct action by the plaintiff, but also prohibits the defendant who made a settlement to think that it is worth its efforts to try and recoup sums from another party for an amount that it was not obligated to pay as a matter of law. It was a voluntary decision based upon Plaintiff-Appellant's own risk evaluation of its insured's exposure. But then to proceed against others looking for found money based upon a decision it made, is not the intent of legislature.

CONCLUSION

In conclusion, the Court of Appeals is correct in its decision. There now exists several appellate decisions discussing the aspects of tort-reform, three of which are specifically related to the question of contribution. In addition there is now a Court of Appeals opinion discussing the rational for the removing of the prior sub-section (b) in the Contribution Statute and reviving the

5. Defendant-Appellee has always asserted total freedom from fault in the happening of this accident, and as set forth in the Statement of Facts made a recovery against these Plaintiff-Appellants for the injuries and damages sustained by Mr. Lawson.

common-law set-off as it relates to those exceptions for which joint and several liability still remains.

The legislature has made it clear that joint liability, which in the past represented joint and several liability has now been abolished and: “the liability of each defendant for damages is several only and is not joint.” MCL 600.2956. That is to say a party may never be exposed, compelled, obligated or responsible for a sum greater than its pro-rata share. Since there exists no basis in law for a party to ever pay a greater amount, therefore, there exists no basis they can ever contend that it paid a greater amount of the common liability which is a requirement under the Contribution Statute.

That the language in the Contribution Statute referring to “and” “or” is in complete accord with the legal principal of joint and several liability and the use of those terms do not give rise to a cause of action for contribution to a settling party but rather, are used descriptively in the context as to how a party may have made a payment as it relates to the common, entire liability as addressed in 600.2925a (1), (2).

Furthermore, the amendment of the Contribution Statute by the deletion of former subsection (b) that referred to set-off is in complete harmony with the complete passage of the Tort-Reform Legislation. There is no need for a set-off because any alleged tort-feasor not involved in the settlement remains liable for an amount that is distinct from the settling defendant based upon the allocation of fault. In effect, there exists no overlap because there was never a legal obligation by the settling party to pay a sum greater than its pro rata share and, therefore, cannot contend that it paid something for which it was not obligated to do.

Plaintiff-Appellant is also unable to address to this Court why the Legislature in § 600.2925a which refers to a right of contribution even though a judgment has not been entered was not deleted, if this statute was meant to apply to all tort actions. The language, when speaking about

a judgment to tort actions in general is completely contrary to tort-reform because unless the case fell within the exception, there would be no judgment in excess of a parties pro rata share. The Court of Appeals in *Knox*, explained clearly that there would be no reason to abolish the Contribution Statute since the right of contribution did exist under the limited exceptions carved out of Tort-Reform where there still exists joint and several liability, a significant part of the statutory scheme that the CSX decision did not recognize. Finally, “fair share liability” is the public policy of this state and the suggestion being advanced by Plaintiff-Appellant that the right to contribution still exists is a backward step and thwarts the well reasoned approach that each party is only responsible for its pro rata degree of negligence.

RELIEF REQUESTED:

It is requested of this Honorable Court to affirm the Court of Appeals and to interpret the relevant statutes that contribution, with the exception of those specified instances where joint and several liability exist, has been abolished by the provisions of Tort-Reform which is in complete accord with the public policy of this state, irrespective if a party reaches a settlement prior to any specific allocation of fault.

Respectfully submitted:
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